

LEX LOCI CONTRACTUS—LEX FORI.

In a case like the present one, the debtor is still liable to an action in the country where the contract was made or is payable. These characteristics of a debt which is prescribed are so plain that we need not be called on to quote any authority, and they clearly show that prescription does not affect the contract, but the remedy.

This rule is distinctly laid down in all the books, and should be applied in cases of conflict of prescription. The Civil Code of Lower Canada, art. 2183, states the old law to be that "extinctive or negative prescription is a bar to the action;" and the same principle is held by all the American and English jurists, and likewise by the French commentators:

"La loi," observes Merlin, "qui déclare une dette prescrite, n'anéantit pas le droit du créancier en soi: elle ne fait qu'opposer une barrière à ses poursuites." Even Bullenois (Observ. 23, vol. 1, p. 530) properly remarks: "L'exception ne tombe que sur l'action et la procédure intentée." "Puisque," says Marcadé, "la prescription n'anéantit pas le droit du créancier par-elle-même et *ipso facto*, mais procure seulement au débiteur une exception qu'il lui sera facultatif d'opposer à l'action, c'est donc par la loi du lieu où ce débiteur doit être actionné, c'est-à-dire du lieu de son domicile, que la prescription doit tout naturellement se régler. Il n'importe pas qu'un autre lieu soit désigné pour le paiement, où ait été celui de la passation du contrat; car selon la pensée d'Huberus, la chose capitale à considérer, la chose à laquelle la prescription se rattache intimement, puisqu'elle vient en opérer l'extinction, c'est l'action et non pas telle ou telle circonstance de la convention: *jus ad actionem pertinent, non ad negotium gestum*."

The Court cannot supply a plea of prescription; it is personal to the defendant; and hence it must be ruled by the law of the place where he is served with process. "La prescription," says even Pardessus, "étant une exception qu'il est permis au débiteur d'opposer à la demande de son créancier, c'est naturellement dans sa propre législation qu'il doit trouver ce secours." (Félix, vol. 1, p. 221.)

In opposition to this plain, intelligible doctrine, Savigny, Massé and Westlake insist upon this other reason: that the *lex loci contractus* is the most reasonable rule, "because it excludes both the arbitrary power of the plaintiff to choose between competing forums that which allows the longest term of prescription, and the arbitrary power of the defendant

to defeat his creditor by removing his domicile to the forum which allows the shortest term, and avoiding, while it runs, personal presence in the special forum of the obligation."

Massé calls the result of such uncertainty, *une conséquence déplorable*. But it is, certainly, more imaginary than real. No man can presume that when one removes from one country to another, his aim is to defeat his creditor by acquiring a shorter term of prescription. As to the arbitrary power of the plaintiff to choose between competing forums, it is certainly not a hardship to him, and with regard to the debtor, it suffices to remark that he is the best judge of his own interest, and to add with Story, s. 579, that "if he choose to remove to any particular territory, he must know that he becomes subject to the laws of that territory, as to all suits brought by or against him."

If, however, inconvenience can be urged as grounds of reasoning, I will merely state that if the *lex loci contractus* should be the rule in one country, for instance in Lower Canada, its citizens would be placed at a great disadvantage as regards their neighbours. In Ontario and in most of the bordering States, prescription in commercial matters is of six years, and we may at once suppose the case of a Lower Canadian removing to any of those countries, immediately after his liability on negotiable paper is terminated here by a prescription of five years. He would, therefore, notwithstanding his discharge here, remain liable to an action there, where the *lex fori* is the exclusive rule. This would be a more *déplorable conséquence* than that pointed out by Massé and others: it would be nothing less than a public inconvenience, and would be contrary to the policy of any commercial nation.

We learn with much pleasure that Mr. Gowan, Judge of the County Court of the county of Simcoe, and Chairman of the Board of County Judges, is about to take a trip to England and the Continent for the benefit of his health, having been granted a long leave for that purpose should he require it.

If ever a man earned a holiday Judge Gowan has; for twenty-seven years he has been unremitting in the discharge of his judicial duties, and we believe we are correct in saying that the whole extent of his leave